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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 28

STATE OF TEXAS AND J. C. CLOPTON AND BULLOCK HYDE, RECEIVERS, ETC.,

Petitioners,

vs.

DAVID DONOGHUE, TRUSTEE OF TRINITY REFINING COMPANY, DEBTOR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR STATE OF TEXAS.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR STATE OF TEXAS.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Opinions Below.

The opinion of the Circuit Court of Appeals (R. 115-125) is reported in 88 F. (2d) 48.

Jurisdiction.

The decree below was entered February 15, 1937 (R. 124). The petition for writ of certiorari was filed April

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13, 1937, and was granted May 3, 1937; the order allowing certiorari "limited (consideration by the Court) to the questions raised upon the application of the State for permission to take proceedings for the confiscation of the alleged illegal oil" (R. 130). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925, U. S. C. A., Title 28, Section 347 (a) as interpreted in Rule 38, Subsection 5 (b) of this Court.

Questions Presented.

1. Whether or not Article 6066a, Section 10, Revised Civil Statutes of Texas (Acts 1935, 44th Leg., p. 624, ch. 246) is violative of the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States by its attempted enforcement against the alleged unlawful oil held by the Trustee in Bankruptcy.

2. Whether or not the District Court and the Circuit Court of Appeals for the Fifth Circuit erred in declining to grant permission to the State of Texas to take proceedings for the confiscation of alleged illegal oil in a Texas State Court of competent jurisdiction seeking confiscation of such alleged illegal oil according to the provisions of Section 10, Article 6066a, Revised Civil Statutes of Texas (Acts 1935, 44th Leg., p. 624, ch. 246).

Statutes Involved.

For the pertinent provisions of the Acts of the Legislature of Texas, Article 6049e (Acts 1935, 44th Leg., p. 180, ch. 76) see Appendix "A", and Article 6066a (Acts 1935, 44th Leg., p. 624, ch. 246) see Appendix "B".

Statement.

Since this Court has limited consideration of this cause to the questions raised upon the application of the State of

Texas for permission to take proceedings for the confiscation of the alleged illegal oil in the hands of the Bankruptcy Trustee, the other proceedings asserting the lack of jurisdiction of the Bankruptcy Court under Section 77B of the Amended Bankruptcy Act to dispossess prior State Court Receivers will not be adverted to in this Brief (R. 130).

Subject to the jurisdictional pleas filed by the State of Texas and the State Court Receivers (R. 32), the Attorney General of the State of Texas filed in the Bankruptcy Court a proceeding seeking permission from the Bankruptcy Court to institute a confiscation proceeding (a suit in rem) in one of the State Courts against the alleged illegal oil, the debtor corporation and the Trustee in Bankruptcy and the other interested parties (R. 75). The oil was described and its location pointed out (R. 76). It was alleged the Railroad Commission under the laws of the State of Texas and the administrative orders of the Railroad Commission promulgated pursuant thereto, had in force, from the year 1932 up to the present, valid orders, regulating and prorating the allowable production of crude petroleum oil for each and every well in the East Texas field, which comprises the counties of Rusk, Gregg, Upshur, Smith, and Cherokee, and that at all times since August 12, 1931, the Statutes of the State of Texas prohibited the purchase, transportation or handling of crude petroleum oil produced in whole or in part in excess of the amount allowed by statute or by any rule, regulation or order of the Railroad Commission of Texas; that at all times since September 29, 1932, the Railroad Commission of Texas had in force valid rules, regulations and orders regulating the oil industry, looking to more effective enforcement of such statutes, including requirements for securing crude oil tenders and certificates of authority before crude oil could be transported in Texas; that at all times since April 13, 1935, the statutes of Texas

prohibited the transportation or handling in any way of illegal oil or the products of illegal oil as defined by the laws of Texas, and further prohibited the transportation or handling in any way of oil or the products of oil transported or handled in violation of any rule, regulation or order of the Railroad Commission; that oil produced conformably to the statutes and the rules, regulations and orders of such Commission is generally known as "allowable oil" and any oil produced from any well in excess of the quota or allowable assigned to any such well is commonly known as "excess oil", "hot oil" or "unlawful oil." That the proration schedules assigning the quotas and allowable production to each well are public records, and notices of same are furnished to the operators in the field; that such operators are charged with the knowledge of the provisions of such allowable schedules. That the oil described in the intervention of the Attorney General on behalf of the State of Texas by reason of the same having been produced in violation of the rules and regulations of the Railroad Commission were that such oil was produced in excess of the allowable granted to the wells from which the same was produced; and that, after such oil had been ~~over~~produced, the products therefrom were transported without procuring approved tenders and certificates of clearance as required by the orders of the Railroad Commission. The Attorney General further asserted that by reason of the fact that the oil was not only produced in violation of the laws of the State of Texas, but was likewise transported in violation of the laws of the State of Texas, the same was subject to confiscation under the laws of the State of Texas in an action by the State of Texas; and the Attorney General sought permission to institute such proceedings in a court of competent jurisdiction in the State of Texas for the reason that it was not within the competency of the Courts of the United States sitting in bankruptcy to entertain a proceeding in the nature of a

suit seeking to confiscate unlawful crude oil and unlawful crude oil products as defined by the laws of the State of Texas; further, it was alleged that to permit the Bankruptcy Court to retain possession of such unlawful oil and unlawful products would amount to the suspension by the Bankruptcy Court of valid penal statutes of the State of Texas and to a suspension of valid rules and regulations of the Railroad Commission of Texas looking to the conservation of the natural resources of the State. Further, that if the Bankruptcy Court be permitted to retain possession of the unlawful oil and unlawful products, the State of Texas would be defeated of its right to confiscate unlawful and contraband property, which under the laws of the State of Texas was forfeited to it and subject to forfeiture proceedings, whereby such unlawful oil and unlawful products, after judgment of condemnation, would be subject to sale at public auction, and the money derived therefrom placed in the General Revenue Fund of the State of Texas, the law under such sale entitling the purchaser thereof to a certificate of clearance to move such oil in commerce.

The Attorney General accordingly asked leave of the Bankruptcy Court to institute the confiscation proceeding in a State Court of Travis County, Texas, looking to the adjudication of the legality of the oil in a State Court, and thereby to establish the rights of the State of Texas to the unlawful oil and unlawful products in question (R. 75-82)[1].

The District Judge declined to permit the Attorney General to institute confiscation proceedings in the State Court

[1] Under paragraph VII of the petition (R. 79) reference is made to certain rules, regulations and orders of the Railroad Commission governing the production and transportation of oil in the East Texas oil fields. Copies of the original orders were attached to the petition seeking leave to institute the confiscation suit in a State Court. On account of their great length the originals by order of the District Judge were sent up to the Circuit Court; and that court by order has transmitted copies of the originals to this Court for consideration.

against the oil (R. 86). The Circuit Court upon this point declared:

> "The validity of this act (Article 6066a, Section 10) is assailed as unconstitutional and void, but we deem it unnecessary to decide this contention. The oil was valuable property; it was not a nuisance *per se;* the title to it was in the debtor at the time the petition for reorganization was filed; and it passed to the trustee as part of the debtor's estate. It is now properly in the custody of the bankruptcy court"[2] (R. 119).

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[2] In the Circuit Court of Appeals the Trustee and the debtor assailed the confiscation act as being in contravention of the 14th Amendment to the Federal Constitution. In this Court the Trustee assails the confiscation act upon the same ground asserted in the Circuit Court, and, in addition, sets forth certain provisions of the oil conservation statutes and the provisions of certain rules of the Railroad Commission promulgated pursuant thereto which regulate different phases of the oil business in Texas—different from the statutes and rules regulating *production* and *transportation*—and complains that, for the State to declare the violation of any one of them would result in a forfeiture of oil, would cause such statute to impose "so harsh and unreasonable and oppressive (penalties) as to go beyond the limits of the State's police power to prescribe penalties for violations of the law." (Br. in Opp. 24-30.) These provisions of the law are not involved, and no attempt has been made by the State to apply the same to the disadvantage of the debtor, and accordingly, their constitutionality may not be raised here by either the debtor or the Trustee for the reason that the State in its petition asking leave to confiscate the oil does not set forth or complain that the oil or oil products became illegal by virtue of the debtor's having violated those statutes and orders of which he complains. The State's petition specifically alleges that the debtor overproduced the oil and oil products in violation of the proration laws, and transported the same in violation of the statutes and orders of the Commission requiring approved tenders for its transporting. A litigant can be heard to question only those matters which are being or are about to be applied to his disadvantage. *Utah Power and L. Co.* v. *Pfost,* 286 U. S. 165, 186; *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282; *Oliver Iron Co.* v. *Lord,* 262 U. S. 172, 180-181; *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571, 576; *Gorieb* v. *Fox,* 274 U. S. 603, 606. As was stated in *Hicklin* v. *Coney,* 290 U. S. 169, 172-173:

> "Another objection, that the Railroad Commission was authorized to regulate the rates of private contract carriers, was answered by the state court in saying that the Commission had never exercised such a power, 'if any it has under the act,' and hence that appellant had no ground for complaint. This is an adequate answer here, on the present showing, as the Court does not deal with academic contentions." (Citing cases.)

Opposed to this majority holding, the dissenting judge of the Circuit Court said:

> "If the oil is 'unlawful oil' and subject to condemnation, certainly by taking bankruptcy or by proceeding in reorganization a willful violator may not change it into lawful oil. If the state was entitled to condemn it before the petition was filed, it was equally so entitled after it was filed" (R. 123).

Specifications of Error.

The District Court sitting in Bankruptcy and the Circuit Court of Appeals erred in refusing to permit the Attorney General to institute confiscation proceedings in a State court against the alleged illegal oil and illegal oil products; the Trinity Refining Company, debtor, and the Trustee in Bankruptcy hold possession of same.

Summary of Argument.

1. The State of Texas under the police power has the undoubted right to conserve its natural resources.

2. The validity of the orders of the Railroad Commission of Texas promulgated pursuant to statutes of the State regulating its oil resources was established by judicial decision in 1932; and said orders remained and were in effect at the time the oil in question was overproduced and transported in violation of law.

3. To more effectively carry out the declared policy of the State to conserve its natural resources the Legislature of Texas in the exercise of its police power enacted Article 6066a, Section 10, which declares oil, which is defined to be unlawful, to be a nuisance, and the same is forfeited to the State of Texas by said act. The Attorney General is authorized to institute a suit *in rem* against the oil and against all interested parties. After judgment of con-

demnation is entered against the oil, the statute directs that it be sold at public auction, the proceeds derived therefrom placed in the General Revenue Fund of the State of Texas and the purchaser at such sale entitled to a certificate of clearance to move the same in commerce.

4. Courts of bankruptcy have no jurisdiction to entertain a suit brought by the State to have forfeited oil which has been produced and transported in violation of its laws; such forfeiture statute being penal in the international sense.

5. If judgment of condemnation in the State's suit to confiscate the alleged illegal oil should go against the oil in question, the forfeiture would take effect at the date of the commission of the unlawful act or acts connected with its production and handling and the right to the property would at such time vest in the State of Texas, although its title would not be perfected until judicial condemnation; forfeiture having taken place at the time stated, the title to such oil could not have been in the debtor at the time of the filing of its petition for reorganization; consequently, the Trustee in Bankruptcy would at this time be in no better position than the debtor to assert title thereto by virtue of the provisions of the Bankruptcy Act.

ARGUMENT.

I.

Authority of the State of Texas to Regulate the Production of Oil.

The courts of the State of Texas and the Federal courts residing in the Fifth Circuit have upheld the validity of orders of the Railroad Commission prorating the production of crude oil in the State of Texas; the Railroad Com-

mission, since the decision of *Danciger Oil & Refining Company* v. *Railroad Commission*, 49 S. W. (2d) 837, has continued to regulate the production of oil in the East Texas field; and that right has been recognized and reaffirmed by the decision of the Texas Supreme Court in *Brown* v. *Humble Oil & Refining Company*, 83 S. W. (2d) 935; opinion on rehearing, 87 S. W. (2d) 1069. Accordingly, the Commission has continued to exercise the powers granted to it by the statutes of the State when it undertakes to regulate production in the East Texas oil field.

> "Federal cases are Amazon Petroleum Corporation *v.* Railroad Commission (D. C.), 5 F. Supp. 633; People's Petroleum Producers *v.* Sterling (D. C.), 60 F. (2) 1041; Danciger Oil & Ref. Co. *v.* Smith (D. C.), 4 F. Supp. 236." *Griswold* v. *The President of the United States*, 82 F. (2d) 922.

The right of the State, in the exercise of its police power, to regulate the production of oil in an effort to conserve its natural resources and to prevent waste has been declared by this Court in the following cases:

Champlin Refining Company v. *Corporation Commission*, 286 U. S. 210;

Bandini Petroleum Company v. *Superior Court*, 284 U. S. 8;

Ohio Oil Company v. *Indiana*, 177 U. S. 190;

Lindsley v. *Natural Carbonic Gas Company*, 220 U. S. 61;

Walls v. *Midland Carbon Company*, 254 U. S. 300.

II.

The Legislature of the State of Texas May Enact Legislation Designed to More Effectively Conserve the State's Natural Resources, by Imposing Penalties and Forfeitures Upon Violators, Thereby Discouraging Transgressions of Such Laws.

That the East Texas oil field from its discovery up to the years of 1933, 1934, and 1935 constituted a major problem with which the Legislature, the Governor, the Attorney General and the various administrative agencies of the State had to cope is demonstrated by the decision in *Constantin* v. *Smith,* 57 F. (2d) 227, by a specially constituted Three-Judge Court sitting in the Western District of Texas and by the decision of this Court in *Sterling* v. *Constantin,* 287 U. S. 378, affirming the decision of the District Court.

The chaotic conditions existing in the East Texas oil field are especially adverted to in the case of *Thompson* v. *Spear,* — F. (2d) — (not officially reported), by the Circuit Court of Appeals for the Fifth Circuit (decided July 23, 1937), in which case the complainant, Spear, brought a suit in equity against the Railroad Commission of Texas asserting that during the years of 1933, 1934 and 1935 the members of the Railroad Commission of Texas through their negligent enforcement of the oil proration orders and their willful discrimination against him, permitted leaseholders adjoining his oil properties to so overproduce their oil wells that excessive drainage resulted to his land, causing great damage to his property, for which reason it was necessary that he also overproduce his wells in order to capture the oil underlying his land, which he asserted rightfully belonged to him under the law. The Court, after discussing the difficulties besetting the enforcement of the proration laws of the State by the Railroad Com-

mission of Texas set forth in the opinion, called attention to the mild penalties imposed by statute upon persons who should violate the conservation laws. The Court further pointed out that:

> "Injunctive procedure in aid of enforcement had proven of little value to the Commission, and as some of the neighboring leases and wells represented such large investments as to be unprofitable unless produced in excess of quotas, a situation was created where the violation of the state laws, and regulations thereunder, was more common than observance, the sovereign power of the state being taxed to the extent of requiring the declaration of martial law for a time.
>
> "On May 11, 1935, the Legislature of the State of Texas amended its conservation laws, providing for new forms of procedure, new penalties, and *a more effective agency for their enforcement. Among other things, the Act provided that 'all unlawful oil and unlawful products, regardless of the date of production or manufacture thereof, are hereby declared to be a nuisance and shall be forfeited to the State as hereinafter provided,'* and defined 'unlawful oil' as meaning oil which 'had been produced within the State of Texas from any well or wells in excess of the amount allowed by any order of the (Railroad) Commission, and oil which has been produced within said state in violation of any law of said state or in violation of any order of the Commission.' The law further provides for judicial seizure and forfeiture of unlawful oil to the State of Texas. Section 10, Article 6066a, Revised Civil Statutes of Texas, 1925 as amended. This legislation was passed subsequent to and consonant with the so-called Connally Hot Oil Act, effective February 22, 1935 (15 U. S. C. A. 715, *et seq.*) under which appropriate enforcement agencies were established. The two agencies began to function, and, as a result of the more stringent provisions of the two acts, as well as the cooperative efforts of the two agencies, many cases were made for injunctions, *forfeitures* and criminal

prosecutions, so that in a comparatively short time *orderly government replaced chaotic disorder*."[3] (Italics added.) *Thompson* v. *Spear*, — F. (2d) —.

This language of the Circuit Court of Appeals demonstrates that before the advent of the State's confiscation act the Legislature was faced with the problem of enacting legislation which should more effectively enforce the State's oil and gas conservation laws and that the confiscation act was designed to promote the general welfare of the State. We submit that one of the most effective methods of preventing overproduction of oil is to take the profit out of the excess oil. It has been noted in *Thompson* v. *Spear* (— F. (2d) —), *supra*, that "injunctive procedure in aid of enforcement had proven of little value to the Commission" in preventing overproducing of oil in Texas. When overproduced oil is actually taken away from the law violator, no profit at all results from the illegal act, thereby discouraging to a large degree the activities of oil operators in overproducing and transporting illegal oil.

III.

Legislative Discretion.

The subject presented was a matter for the exercise of legislative discretion, and the Legislature of Texas was au-

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[3] On April 29, 1935, a specially constituted Three Judge Federal Court in the case of *Hercules Oil & Refining Company* v. *Thompson*, 10 F. Supp. 988, declared that oil produced and handled in violation of the conservation laws should be placed in the same category with illegal liquors, and the production and handling of unlawful oil should be looked upon as a public nuisance. Moreover, the Texas Courts have refused to permit the movement of excess oil in commerce notwithstanding the fact that the persons overproducing the same had paid a penalty for violating the rules of the Commission in respect of overproduction and "it cannot be said that the mere payment of the penalty for having produced the oil illegally will change its character and entitle the owner thereof to deal in it as it would in oil legally produced." *Railroad Commission* v. *Skipper-Bivins Oil Co., Inc.*, 85 S. W. (2d) 1048 (writ of error refused by Supreme Court). *Railroad Commission of Texas* v. *Haynes Drilling Company*, 94 S. W. (2d) 200.

thorized to determine and select the means to be adopted to accomplish the end desired; namely, to more effectively conserve the State's natural resources.

In respect of this question this Court has many times announced the rule that the choice of the means to achieve a purpose which is competent for a government to put into effect is a matter of legislative discretion; further, where the choice made bears a reasonable relation to the purposes sought to be attained, the exercise of the discretion is not subject to judicial review. Whether the method adopted be wise or unwise, whether best or poorest, are not questions with which the courts are concerned in passing judgment upon the power to prescribe them or their enforcement according to the means selected. *Chicago B. & Q. R. Company* v. *McGuire,* 219 U. S. 549, 569; *Block* v. *Hirsh,* 256 U. S. 135; *Ohio Oil Company* v. *Indiana,* 177 U. S. 190; *Walls* v. *Midland Carbon Company,* 254 U. S. 300.

Fairly debatable questions as to the reasonableness, wisdom and propriety of the legislative determination are not for the courts but for the legislative body. *Standard Oil Company* v. *Marysville,* 279 U. S. 582; *Jacobson* v. *Massachusetts,* 197 U. S. 11.

IV.

The Test of Reasonableness.

A police regulation which bears a reasonable relation to an object within the governmental authority is valid. The recognized test of reasonableness was laid down by this Court in *Chicago B. & Q. R. Company* v. *Illinois,* 200 U. S. 561, 592, when it said:

> "And the validity of a police regulation, whether established directly by the state or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation,

whether arbitrary or reasonable, and whether really designed to accomplish a legitimate public purpose."

The Legislature of the State of Texas evidently viewed unlawful oil in the same light as did the court in *Hercules Oil Company* v. *Thompson et al.*, 10 F. Supp. 988, which was decided on April 29, 1935, where it said:

> "We think it may not be doubted that the state has the right to prohibit the production of oil to prevent waste, because such production is in the nature of a public nuisance, and that it may make and authorize all reasonable regulations to bring about the abatement of this nuisance, extending to preventing movement in commerce of illegally produced oil and its products. We think it perfectly reasonable for the state, as a part of a preventive plan, to thoroughly abate the nuisance, to forbid the transportation, either interstate or intrastate, of oil illegally produced, and that a prohibition against the movement of such oil and its products in commerce is unquestionably valid. Atlas Pipe Line Co. *v.* Sterling (D. C.) 4 F. Supp. 441."

The Federal cases supporting the right to close, as nuisances, places where illegal liquor is sold are ample authority to sustain the Texas act, prohibiting the transportation of, handling of illegally produced oil or its products. On May 11, 1935, Article 6066a and Article 6049e became effective. Section 10 of Article 6066a declares illegal oil to be a nuisance and provides for its forfeiture to the State; Section 10 of Article 6049e prohibits the purchase, acquisition, sale, transportation, refining, processing or the handling in any other way of crude petroleum oil produced in whole or in part in violation of any oil or gas conservation statutes of this State or of any rule, regulation or order of the Commission promulgated pursuant to statute. By the provisions of the same section these prohibitions apply to the products of crude petroleum oil. These statutes declare

the common law rule upon the subject, for as will be later pointed out, the courts had already declared illegal oil to be contraband, and had declined to permit its movement in commerce.

Oil handled in violation of law has been declared by the courts to be contraband and its movement in commerce has been prohibited. *Railroad Commission* v. *Archer,* 80 S. W. (2d) 506. Compare *Railroad Commission* v. *Burnham,* 80 S. W. (2d) 496; *Railroad Commission* v. *Tyler, Texas Oil & Refining Company,* 80 S. W. (2d) 500; *Railroad Commission* v. *Bradshaw,* 80 S. W. (2d) 508; and *Railroad Commission* v. *Linzie Refining Company,* 80 S. W. (2d) 504.

Such oil, having been declared contraband by the courts, naturally lost its attributes of property; not being property, it was a subject matter with which the courts believed they should not deal. This was the condition of the common law rule upon the subject when the State's confiscation act became effective. It was a matter of general notoriety, of which the courts take judicial knowledge, that at the time of the enactment of the confiscation act there were several million barrels of contraband oil in either earthen or steel storage in the East Texas oil field, the movement of which was prohibited.[4] The enormous quantity of this oil naturally constituted a fire hazard; and the legislature, in addition to its efforts to more effectively carry out the conserva-

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[4] The Federal Courts sitting in Texas have taken judicial knowledge of "the conditions in the East Texas oil fields as to surreptitious and illegal production of oil there." (*Melton* v. *Railroad Commission,* 10 F. Supp. 984-987.) This enormous amount of contraband oil stored in open and steel storage in the East Texas oil field was the result of surreptitious practices engaged in by oil operators in East Texas. This Court long ago considered itself "bound to take notice of public facts and geographical positions" and that certain parts of this country had "been infested at different periods by smugglers" and same was a "matter of general notoriety" and such facts could "be gathered from the public documents of the government." (*The Apollon,* 9 Wheat. 362, 6 L. Ed. 111 (P. 374) per Story, J.)

tion policy of the State by forfeiting it to the State, had to devise some means of disposing of it.

It is submitted that the confiscation act is a valid exercise of the police power and such legislation does not deprive persons holding illegal oil or its products of their property rights therein, without due process of law, nor does it deprive them of the equal protection of the law under the 14th Amendment to the Constitution of the United States. In *Lawton* v. *Steele*, 152 U. S. 132, this Court had under consideration the validity of a New York law which provided for the summary seizure and destruction of boats, fish nets etc. which were used to catch fish out of season. The right of the State of New York was upheld, to provide for the seizure and destruction of these objects—innocent in themselves—when used to violate the laws of the State. This decision is peculiarly applicable to the situation existing in Texas with regard to the production, transportation and handling of illegal oil and its products. Said the court:

> "The legislature, however, undoubtedly possessed the power not only to prohibit the fishing by nets in these waters, but to make it a criminal offense, and to take such measures as were reasonable and necessary to prevent such offenses in the future. It certainly could not do this more effectually than by destroying the means of the offense. * * *"

If the New York Legislature had power to adopt the most effectual means of preventing a violation of its laws which prohibited fishing in closed seasons, which means provided for the destruction of the instruments by which the offense might be committed, why has not Texas the same power to abate the nuisance of illegally produced oil by forfeiture and confiscation?

In *Van Oster* v. *Kansas*, 272 U. S. 465, this Court had under consideration a Kansas law which provided for the

seizure and forfeiture of vehicles used for the illegal transportation of intoxicating liquors. Mr. Justice Stone said:

> "It is not questioned that a state in the exercise of its police power may forfeit property used by its owner in violation of state laws prohibiting the liquor traffic * * * (citing cases). * * * It has long been settled that statutory forfeitures of property entrusted by the innocent owner or lienor to another who uses it in violation of the revenue laws of the United States is not a violation of the due process clause of the 5th Amendment * * * (citing cases). * * * We do not perceive any valid distinction between the application of the 14th Amendment to the exercise of the police power of the state in this particular field, and the application of the 5th Amendment to the similar exercise of the taxing power by the Federal government, or any reason for holding that the one is not as plenary as the other." (P. 467.)

From this holding it is submitted that a sovereign State under the 14th Amendment to the Federal Constitution has as broad a power to forfeit contraband articles handled in violation of its laws as the Federal government may do under its revenue laws. See also *Samuels* v. *McCurdy*, 267 U. S. 188.

The Congress of the United States has provided for the forfeiture of property used to violate the revenue laws, and such enactments have been sustained by this Court. *Henderson's Distilled Spirits*, 14 Wall. 44; *Dobbins Distillery* v. *United States*, 96 U. S. 395; *Goldsmith, Jr.-Grant Co.* v. *United States*, 254 U. S. 505; *Various Items of Personal Property, Waterloo Distilling Co.* v. *United States*, 282 U. S. 577; and *United States* v. *Three Copper Stills*, 47 Fed. 495.

Congressional enactments under the customs laws have been sustained. *Thomas Wood, Jr.*, v. *United States*, 14 Curtis 336, 16 Peters 342.

Vessels used in acts of piracy may be condemned and sold. *The Palmyra,* 12 Wheaton 1.

Ships used to transport aliens into this country contrary to Federal law have been forfeited and sold. *United States* v. *Olsen,* 57 Fed. 579.

Property of a person engaged in acts of treason or rebellion against the sovereign have been confiscated and sold. *Bigelow* v. *Forrest,* 9 Wall. 339.

Police measures adopted, having a reasonable relation to accomplish the end in view, have been sustained by this Court in the following cases:

Adams v. *Milwaukee,* 228 U. S. 572;

Jacob Ruppert v. *Caffey,* 251 U. S. 264;

Upton et al. v. *Felton,* 4 Fed. Supp. 585 (Upholding the statute requiring the owner to destroy red cedars as a public nuisance when growing within two miles of an orchard containing more than 1,000 apple trees and discussing the police power and due process clause);

Ohio Oil Company v. *Conway,* 281 U. S. 146;

Miller v. *Schoene,* 48 S. Ct. Rep. 246;

Chicago & Alton Railroad Co. v. *Tranbarger,* 238 U. S. 67;

Purity Extract Co. v. *Lynch,* 226 U. S. 192 (In which it was held that the State was the judge of the means necessary to make its law effective);

Northwestern Fertilizing Co. v. *Hyde Park,* 97 U. S. 59.

See also:

Robertson Cadillac Motor Co. v. *Ratekin,* Neb. 177 N. W. 339;

Sterrett v. *Gibson,* 168 S. W. 16.

V.

The Bankruptcy Court Has no Jurisdiction to Enforce the Texas Confiscation Act.

Filing of the motion by the State, seeking leave to institute such a confiscation suit in one of its Courts, was the only avenue open to it whereby it could effectually abate the nuisance of illegally produced oil. The State could not, by way of intervention in the Bankruptcy Court, accomplish the results sought to be attained under authority of its confiscation statute, for the reason that the Bankruptcy Court has no jurisdiction to entertain a confiscation suit on behalf of the State seeking forfeiture of the oil, because Article 6066a, Section 10, and cognate amendments under Title 102, Revised Statutes of Texas are penal in the international sense, and are not capable of being enforced in Courts of the United States.

The penalty of forfeiture provided for results from violations of the conservation laws, and is visited upon such violators in vindication of the State's policy in respect of its efforts to conserve its natural resources. Testing the statute by what is said in *Wisconsin* v. *Pelican Insurance Co. of New Orleans,* 127 U. S. 265, no other conclusion can be reached than that Article 6066a and related statutes are penal in the international sense. This decision follows the holding of Chief Justice Marshall in *The Antelope,* 10 Wheat. 66:

> "The courts of no country execute the penal laws of another."

Wisconsin v. *Pelican Insurance Co.* (127 U. S. 265), *supra,* is followed in *Huntington* v. *Attrill,* 146 U. S. 657, where the question of jurisdiction to enforce State penal laws is further discussed, the latter holding that the courts of

the United States have no power to execute the penal laws of the individual States.[5]

VI.

Forfeiture of Offending Property Takes Place at the Time of the Commission of the Unlawful Act.

Section 10 (a), Article 6066a should be construed in the light of the authorities declaring (as respects legislative acts decreeing the forfeiture of contraband articles) that actual forfeiture occurs at the date of the commission of the unlawful act; unlawful oil and unlawful products of oil became forfeit oil immediately upon being produced or handled in violation of law. In *Griswold* v. *The President of the United States,* 82 F. (2d) 922, the Circuit Court of Appeals for the 5th Circuit, in referring to the Texas confiscation act, said that, "Those laws make contraband and *forfeit to the State* oil produced in violation of them" (P. 924) and points out that Sections 10 (a), (b), (c), and (d) provide for the filing of suits *in rem* against unlawful oil and unlawful products "*to enforce the forfeiture.*" Thus, it is claimed that the statutes of the State of Texas dealing with unlawful oil and the decisions of the Courts construing them should be looked upon as working a forfeiture of such oil upon the occasion of its being produced, transported or handled in violation of the conservation laws. This contention is consistent with the holdings of

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[5] Compare *State of Indiana* v. *Alleghany Oil Co.,* 85 F. 870. *Leflar Extra State Enforcement of Penal and Governmental Claims,* 46 Harvard Law Review 193.

Upon this point the Dissenting Judge in the case at bar said:

> "The proceeding to condemn is a special one; it must be followed exactly as provided for by the statute. U. S. *v.* Smelser (C. C. A.) 87 F. (2d) 799; Mingus *v.* Wadley, 115 Tex. 551, 285 S. W. 1084. The bankruptcy court sitting in reorganization is not competent to inquire into or adjudge the condemnation." *State of Texas* v. *Donoghue,* 88 F. (2d) 48. (P. 53.)

the decisions of this Court. In *United States* v. *1960 Bags of Coffee,* 8 Cranch. 398, the question as to the time at which forfeiture actually takes place was definitely decided to be at the time of the commission of the unlawful act or acts and the date of the judgment of condemnation "of such articles relates back to the time of the commission of the offense." In later cases, one of which is *United States* v. *Stowell,* 133 U. S. 1, the Federal courts have held that property forfeited by reason of the crime with which it is connected is not entitled to legal protection. This Court said in the *Stowell* case:

> "By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right of the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed, and the condemnation, when obtained, relates back to that time, *and avoids all intermediate sales and alienations, even to purchasers in good faith.*
>
> "The rule was early applied under statutes enacting that whenever goods, the importation of which was prohibited, should be imported, they should be forfeited; and that if any ship should leave port without clearance or giving bond as required by law, the ship and the cargo should be forfeited. United States *v.* 1960 Bags of Coffee, 12 U. S., 8 Cranch. 398 (3:602); The Mars, 12 U. S. 8 Cranch. 417 (3:609). It has been recognized and acted on in cases of goods imported in fraud of the Customs Laws. Gelston *v.* Hoyt, 16 U. S. 3 Wheat. 246, 311 (4:381, 397); Wood *v.* United States, 41 U. S. 16 Pet. 342, 362 (10:987, 995); Caldwell *v.* United States, 49 U. S. 8 How. 366 (12:1115). And it has been steadfastly upheld under the Internal Revenue Laws; in one case, under an

enactment punishing by fine and imprisonment any person removing distilled spirits from the distillery contrary to law, with intent to evade the payment of the tax thereon, and providing that spirits so removed should be forfeited; and in another case under an enactment that any person fraudulently executing an instrument required by the Internal Revenue Laws should be punished by fine and imprisonment and the property to which the instrument related should be forfeited. Henderson's Distilled Spirits, 81 U. S. 14 Wall. 44 (20:815); Thacher's Distilled Spirits, 103 U. S. 679 (26:535)." (Italics added.)

In *Milam* v. *United States,* 296 Fed. 629-631, it is said:

"Property forfeited by reason of the crime with which it is connected is not entitled to legal protection. A person in possession of forfeited property has no right to the protection of his possession, and such forfeited property is always rightfully subject to seizure on behalf of the government. United States *v.* Stowell, 133 U. S. 19, 10 Sup. Ct. 344, 33 L. Ed. 555; Taylor *v.* United States, 3 How. 197, 205, 11 L. Ed. 559; Boyd *v.* United States (4th Circuit) 286 Fed. 930; United States *v.* Welsh (D. C.) 347 Fed. 239."

It is respectfully submitted that the provisions of the Texas confiscation act should receive the same construction that the congressional enactments received in the above cited cases by this Court.

VII.

The Trustee in Bankruptcy in Dealing With Crude Petroleum Oil in the State of Texas is Subject to and Bound by Valid Laws, Regulating the Handling of Such Commodity.

On May 11, 1935, unlawful oil and unlawful products of oil, by legislative act, were defined by Section 1, Paragraphs (d) and (e) of Article 6066a; on such date the transportation, sale or handling of unlawful oil or unlawful

products of oil was specifically prohibited by statute (Article 6049e). Regardless of whether the confiscation act may be valid or invalid, the Bankruptcy Court and its Trustee are bound by other valid State laws which deal with a subject matter—over which the Trustee assumes to assert title—and which matter is subject to the exercise of the State's police power.

The State and Federal courts have held, regardless of arbitrary action on the part of agents of the Railroad Commission in attempting to enforce the conservation laws, the owner of the same may not sell, transport or otherwise handle unlawful oil; and this prohibition is found in Article 6049e (Acts 1935, 44th Leg., p. 180, ch. 76). The confiscation act and the act prohibiting in any manner the handling of unlawful oil or its products have been recognized as valid enactments in *Griswold* v. *The President of the United States*, 82 F. (2d) 922.

The mere filing of a petition for corporate reorganization under Section 77B could not clothe the Bankruptcy Trustee with any greater rights than the debtor had, respecting the oil in question, at the time of the filing of the petition for reorganization in the Bankruptcy Court. If this oil was and is illegal and its handling inhibited by State statutes, the Bankruptcy Court could not by any of its extraordinary processes compel an administrative agency of the State to grant permission to the Bankruptcy Trustee to transport, sell or otherwise handle the same in such manner as to place it in the channels of commerce. Under the Connally Act [6] (Act of February 22, 1935, c. 18,

[6] By Act of Congress, June 14, 1937, it is provided that:

"Section 13 of the Act entitled 'An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes', approved February 22, 1935 (15 U. S. C. A., Section 715 l) is amended by striking out 'June 16, 1937' and inserting in lieu thereof 'June 30, 1939'."

49 Stat. at Large, p. 30, 15 U. S. C. A. Sections 715-715, 1) the Trustee could not move it interstate. If the oil in question were illegal at the time of the filing of the petition for reorganization by the debtor, the oil would likewise be contraband under the laws of the United States. Sec. 715a, *supra*. For the United States District Court sitting in Bankruptcy to authorize the Trustee in Bankruptcy to move oil declared to be unlawful under the laws of this State would constitute a refusal by such court to give effect to the declared policy of the Congress of the United States, which is to protect interstate and foreign commerce from the burden and harmful effect upon such commerce caused by contraband oil as defined by such act, and also to encourage the conservation of deposits of crude oil situated within the United States.[7]

Moreover, the Trustee is bound to comply with all valid laws of this State, and would have to invoke action of the administrative agencies of the State charged by law with the enforcement of the conservation laws before he would be entitled to move the oil in commerce. This State agency has the authority to pass upon applications of the owners of oil seeking authority to move such oil. If an application should be denied, Section 9 of Article 6066a authorizes a review by a State court which may not overrule the action of the agents of the Railroad Commission unless they have acted unlawfully or arbitrarily.[8] While it is true the Trustee may appeal to the Federal courts having jurisdiction upon the completion of the administrative function by the agents of the Railroad Commission if the jurisdictional

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[7] The present provisions of the Connally Act were enacted by Congress after the decision of *Panama Refining Company* v. *Ryan*, 293 U. S. 388, and do not now contain the infirmities pointed out in that case.

[8] Compare *Railroad Commission* v. *Lacy*, 100 S. W. (2d) 118; *Curtis* v. *Railroad Commission*, 104 S. W. (2d) 905; *Davenport et al.* v. *Railroad Commission*, 85 S. W. (2d) 661, and *Davenport* v. *Railroad Commission*, 89 S. W. (2d) 1006; *Railroad Commission* v. *Morgan*, 92 S. W. (2d) 1131.

requisites are present,[9] yet the Federal courts will not overturn the action of such agency unless it be clearly shown that such agency has violated some right recognizable under the Constitution of the United States. *Panama Refining Company* v. *Railroad Commission,* 16 F. Supp. 289. If no such right is denied, a Federal court, under the 11th Amendment, would be without jurisdiction to enjoin enforcement by the State of its conservation laws by any character of proceeding, whether initiated in a Federal bankruptcy court or in any other Federal tribunal. "The 11th Amendment is an explicit limitation of the judicial power of the United States" * * * and * * * "Such a suit cannot be entertained upon the ground that the controversy arises under the Constitution or laws of the United States" * * * *Missouri* v. *Fiske,* 290 U. S. 18-29 (P. 26).

Whether the proceeding to enjoin the enforcement of the conservation laws of the State against the Trustee in Bankruptcy be directed against the agents of the Commission, the Commission itself, by naming its members, or the State of Texas itself, such suit or proceeding essentially would be one against the sovereign State.

See *Ex parte Ayers,* 123 U. S. 443; *Louisiana* v. *Jumel,* 107 U. S. 711; *Cunningham* v. *Macon & B. Railroad Co.,* 109 U. S. 446; *Hopkins* v. *Clemson Agricultural College,* 221 U. S. 636; *Christian* v. *Atlantic & N. C. R. Co.,* 133 U. S. 233; *Carolina Glass Co.* v. *South Carolina,* 240 U. S. 305; and *Fitts* v. *McGhee,* 172 U. S. 516.

Conclusion.

We submit the Bankruptcy Court should have granted leave to the State of Texas, upon the timely motion of its Attorney General, to proceed in a State Court against the alleged illegal oil; that it should have taken heed of the official representation made by the Attorney General

[9] Compare *Panama Refining Company* v. *Railroad Commission,* 16 F. Supp. 289.

of the State of Texas as to the illegal character of such oil and have permitted him to try out the question of its legality in one of the State's tribunals. If the State should prevail in such suit, it is obvious the Bankruptcy Trustee would have no legal right to the oil in question, for the reason there inured to the Trustee in Bankruptcy only those rights the debtor itself had at the time of the filing of the petition for corporate reorganization. Again, in such a proceeding for confiscation in a State Court should judgment go against the State, the latter would then have had its day in Court, and the rights of the debtor and its Trustee to the oil would have been vindicated.

WHEREFORE, it is submitted to the Court that the decision below should be reversed.

Respectfully submitted,

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APPENDIX "A".

Art. 6049e. Definitions.

SEC. 1. Unless the context otherwise requires, the words defined in this Section shall have the following meaning when used in this Act, to-wit: "Commission" means the Railroad Commission of Texas. "Person" means any natural person, corporation, association, partnership, receiver, trustee, guardian, executor, administrator and a fiduciary or representative of any kind. The word "pool" means an underground reservoir containing a connected accumulation of crude petroleum oil, or natural gas, or both. The words "crude petroleum oil," "crude petroleum," "crude oil," and "oil" mean the same thing whether used in this Act or elsewhere in the conservation Statutes of this State relating to oil and gas. The words "natural gas" and "gas" mean the same thing whether used in this Act or elsewhere in the conservation Statutes of this State relating to oil and gas. The words "product" or "product of crude petroleum oil or natural gas" mean any commodity or thing made or manufactured from crude petroleum oil or natural gas, and all derivatives or by-products of crude petroleum oil or natural gas, including refined crude oil, crude tops, topped crude, processed crude petroleum, residue from crude petroleum, cracking stock, uncracked fuel oil, treated crude oil, fuel oil, residuum, gas oil, naphtha, distillate, gasoline, kerosene, benzine, wash oil, waste oil, lubricating oil, casinghead gas, casinghead gasoline, blended gasoline, and blends or mixtures of crude petroleum oil, or natural gas, or any derivatives or by-products thereof.

Newspaper Publication of Rules, Regulations or Orders of Commission.

SEC. 8. The publication in any newspaper of any rule, regulation or order of the Commission shall not be required before such rule, regulation, or order shall become effective for any purpose except as may be required for the enforcement of the criminal provisions of Chapter 165, Acts of the

Forty-third Legislature, Regular Session, or any amendment thereof.[10]

Prohibition of Purchase, Acquisition or Sale in Violation of Statute.

SEC. 10. The purchase, acquisition, or sale, or the transportation, refining, processing, or handling in any other way, of crude petroleum oil or natural gas, produced in whole or in part in violation of any oil or gas conservation Statute of this State or of any rule, regulation or order of the Commission thereunder, is hereby prohibited.

The purchase, acquisition, or sale, or the transportation, refining, processing, or handling in any other way, of any product of crude petroleum oil or natural gas which product is derived in whole or in part from any crude petroleum oil or natural gas or any product of either, which crude petroleum oil or natural gas or product was in whole or in part produced, purchased, acquired, sold, transported, refined, processed, or handled in any other way, in violation of any oil or gas conservation Statute of this State, or of any rule, regulation or order of the Commission thereunder, is hereby prohibited.

The Commission shall have the power to promulgate and enforce such rules, regulations and orders as may be necessary to carry the provisions of this Section into effect and to prevent a violation thereof; provided that whenever the Commission requires a showing that refined products were manufactured from oil legally produced, such requirement shall be of uniform application throughout the State; and provided that whenever such rule, regulation or order is promulgated for the purpose of controlling any condition in any local area or to prevent a violation in any local area, then upon the complaint of any person that the same or similar conditions exist in some other local area and the promulgation and enforcement of such rule could be beneficially applied to such additional area, the Commission shall determine whether or not such conditions do exist, and if it be shown that they do, then such rule, regu-

[10] Vernon's Rev. Pen. Code, art. 1112b.

lation or order shall be enlarged to include such additional area.

None of the provisions of this Section shall apply to the purchase of any products of crude petroleum when made by the ultimate consumer from a retail distributor thereof.

Commission Through Attorney General Authorized to Restrain by Suit Violation, Jurisdiction of Suits.

SEC. 13. Whenever it shall appear that any person is violating or threatening to violate any provision of this Act, or of Title 102 of the Revised Civil Statutes of Texas, 1925, as amended, or of any rule, regulation or order of the Commission promulgated thereunder, the Commission, through the Attorney General, shall bring suit in the name of the State of Texas against such person in any Court of competent jurisdiction in Travis County, or in the county of the residence of the defendant or, if there be more than one defendant, in the county of the residence of any of them, or in the county in which such violation is alleged to have occurred, to restrain such person from violating such Statute or such rule, regulation, or order of the Commission, or any part thereof; and in such suit the Commission in the name of the State of Texas may obtain such injunctions, prohibitory and mandatory, including temporary restraining orders and temporary injunctions, as the facts may warrant.

The violation by any person of any injunction granted under the provisions of this Section shall be sufficient grounds for the appointment by the Court, either upon its own motion or that of the Commission in the name of the State of Texas, of a receiver to take charge of such properties of such person, and to exercise such powers as in the judgment of the Court shall be necessary in order to bring about compliance with such injunction; provided, however, that no such receiver shall be appointed except after notice and hearing. The power to appoint a receiver as herein provided shall be in addition to and cumulative of the power to punish for contempt.

Act Cumulative.

SEC. 16. This Act shall be cumulative of all laws of the State of Texas, not inconsistent herewith and not hereby expressly repealed or amended.

Repeals, Penalties and Pending Prosecutions Not Affected.

SEC. 17. Articles 6007, 6009, 6011, and 6017 of the Revised Civil Statutes of Texas, 1925; Section 6, Chapter 313, Acts of the Forty-first Legislature, Regular Session;[11] Sections 4 and 6, Chapter 26, Acts of the Forty-second Legislature, First Called Session;[12] Section 14, Chapter 2, Acts of the Forty-second Legislature, Fourth Called Session;[13] and Section 1, Chapter 64, Acts of the Forty-third Legislature, Third Called Session,[14] are hereby repealed. All other laws and parts of laws in conflict or inconsistent with any of the provisions of this Act are hereby repealed. No violation committed and no liability, penalty or forfeiture, incurred prior to the time when any Statute, or part thereof, repealed or altered by the provisions of this Act, shall be discharged or affected by such repeal or alteration; but prosecutions and suits for such violations, liabilities, penalties and forfeitures, shall be instituted and proceeded with in all respects as if such prior Statute, or part thereof, had not been repealed or altered, except that where the mode of procedure or matters of practice have been changed by the provisions of this Act, the procedure had after this Act shall have taken effect in such prosecution or suit shall be, as far as is practicable, in accordance with the provisions of this Act. The amendment, repeal or expiration of a rule, regulation or order of the Commission, made or promulgated under the provisions of this Act, or of Title 102, Revised Civil Statutes of Texas, 1925, as amended, shall not have the effect of releasing or discharging any per-

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[11] Article 6036b.

[12] Article 6049c, paragraphs 4 and 6.

[13] Article 6049d, paragraph 14.

[14] Article 6049c, paragraph 14.

son violating said rule, regulation or order prior to the effective date of such amendment, repeal, or expiration from any liability, penalty, or forfeiture incurred prior to such effective date; but prosecutions and suits for such violations, liabilities, penalties, or forfeitures shall be instituted and proceeded with in all respects as if such rule, regulation or order had not been amended, or repealed, or had not expired.

Acts Saved From Repeal.

SEC. 18. Nothing in this Act shall be construed to repeal Chapter 36, Acts of the Forty-first Legislature, Fifth Called Session, known as the "Common Purchaser Act," and the amendments thereto,[15] except as specifically repealed hereby or inconsistent herewith; and this Act shall not be construed to repeal or modify Chapter 97, Acts of the Forty-third Legislature, Regular Session, known as the "Marginal Well Act."[16]

Anti-trust Laws Unaffected.

SEC. 19. It is especially provided that nothing herein shall in any manner affect, alter, diminish, change or modify the anti-trust and/or monopoly Statutes of this State, and that no provision of this Act shall in any manner directly or indirectly authorize a violation of such anti-trust and/or monopoly Statutes, and in this connection it is hereby declared and especially provided by the Legislature of the State of Texas enacting this legislation that notwithstanding the provisions of any other sections of this Act, it is the legislative intent that no provision of this Act shall in any manner affect, alter, diminish or amend any provision of the anti-trust and/or monopoly Statutes of this State, or in any manner authorize a violation of such anti-trust and/or monopoly Statutes; and it is further especially provided that if any provision of this Act shall be so construed by any Court of this State as to in any manner affect, alter, diminish, or modify any provision of the anti-trust and/or monopoly Statutes of this State, then in that event any such

[15] Article 6049a.

[16] Article 6049b.

section, sub-section, sentence, or clause or any provision of this Act so construed as conflicting with said monopoly and/or anti-trust Statutes, is hereby declared null and void rather than the anti-trust and/or monopoly Statutes of this State. The legislative intent herein expressed is to prevail and take precedence over the provisions of any other section or sections of this Act, regardless of any statement therein to the contrary.

Effective Period.

SEC. 20. The provisions of this Act shall end and terminate September 1, 1939. (As amended Acts 1937, 45th Leg., H. B. #9, Par. 1.)

Partial Invalidity.

SEC. 21. If any section, portion, clause or part of this Act be invalid or unconstitutional, the same shall not affect any remaining parts of this Act and it is expressly hereby declared that the Legislature would have passed such remaining parts of this Act with such invalid or unconstitutional section, portion, clause or part omitted. (Acts 1935, 44th Leg., p. 180, ch. 76.)

Effective April 13, 1935.

APPENDIX "B".

Art. 6066a. Regulation of Transportation of Oil or Products Thereof; Definition of Terms.

SEC. 1. (a) The word "Commission" shall mean the Railroad Commission of Texas. The phrase "order of the Commission" shall include any rule, regulation or order adopted by the Railroad Commission of Texas pursuant to the oil and gas conservation statutes of this State, including all provisions of Title 102 of the Revised Civil Statutes of Texas of 1925 and all amendments thereto.

(b) The word "oil" or phrase "crude oil" herein used shall include crude petroleum oil in its natural state as

produced and crude petroleum oil from which only the basic sediment and water have been removed. The word "gas" herein used shall include natural gas, bradenhead gas, casinghead gas, and gas produced from an oil or gas well.

(c) The word "product" shall include refined crude oil, crude tops, topped crude, processed crude petroleum, residue from crude petroleum, cracking stock, uncracked fuel oil, fuel oil, treated crude oil, residuum, gas oil, casinghead gasoline, natural gas gasoline, naphtha, distillate, gasoline, kerosene, benzine, wash oil, waste oil, blended gasoline, lubricating oil, blends or mixtures of petroleum and/or any and all liquid products or by-products derived from crude petroleum oil or gas, whether hereinabove enumerated or not.

(d) "Unlawful oil," as that term is used herein, shall include oil which has been produced within the State of Texas from any well or wells in excess of the amount allowed by any order of the Commission, and oil which has been produced within said State in violation of any law of said State or in violation of any order of the Commission, and shall include any oil transported in violation of any such law or in violation of any such order.

(e) "Unlawful product" shall be construed to include any product any part of which was processed or derived in whole or in part from unlawful oil or from any product of unlawful oil, or from unlawful gas, or which is transported in violation of any order of the Commission or in violation of any law of Texas.

(f) "Unlawful gas" shall be construed to include gas produced or transported in violation of any order of the Commission or so produced or transported in violation of any law of Texas.

(g) The word "tender" shall mean a permit or certificate of clearance for the transportation of oil or products approved and issued or registered under the authority of the Commission.

The form of any tender and the application therefor shall be prescribed by order of the Commission and shall

show the name and address of the shipper or person tendering oil or products for transportation, name and address of the transporting agency (where such order requires the transporter to be designated), quantity and true classification of each commodity authorized to be transported, place or places where delivery will be made to the transporting agency, and such other related data as may be prescribed by order of the Commission. A tender shall bear a date and serial number, shall show its expiration date, and shall be executed by the agent or agents authorized by the Commission to deny, approve or register tenders. No tender shall be approved or registered by such agent authorizing the shipment or transportation of any unlawful oil or unlawful product.

(h) The word "manifest" shall be construed to include any document issued by a shipper covering oil or products to be transported by truck or other motor vehicle.

The form of a manifest may be prescribed by order of the Commission, and shall bear a certificate signed by the shipper stating the amount of oil or products and each of them to be transported. A manifest shall show, when required by order of the Commission, the date and serial number of the tender, if a tender is required, authorizing such transportation, or any seal or number or other evidence of such tender, the amount and classification of each such product to be transported, the name and address of the transporting agency, name and address of shipper, name and address of consignee, if known, the name and address of the driver or operator of such truck or vehicle; the number on the license plate on such truck or vehicle; the day, hour and place where such truck or vehicle was loaded and the destination, if known, of such load, and such other related data as may be required by order of the Commission. If the form of manifest is not prescribed by order of the Commission, each shipper required to issue a manifest to a transporter shall utilize the form of manifest commonly used in commercial transactions or the form of manifest required by any State agency or Department of this State to accompany the movement of gasoline.

(i) The word "person" shall include natural person, corporation, association, partnership, receiver, trustee, guardian, executor, administrator, or representative of any kind.

(j) The phrase "shipping papers" shall be construed to include bills of lading covering oil or products transported by railway, manifest covering oil or products transported by truck or motor vehicle, and any written document covering oil or products transported by pipe line, boat or barge. The phrase "delivery ticket" shall be construed to include any expense bill or written document covering oil or products delivered.

Transportation; Regulations.

SEC. 2. (a) Whenever, by order of the Commission, a tender is required before oil or products may be transported, and whenever pursuant to such order, an agent of the Commission approves and issues or registers a tender authorizing the transportation of oil or products by trucks or motor vehicles, it shall be the duty of the person obtaining such tender to sign and issue a manifest to the operator of each such truck or motor vehicle, which manifest shall show the date and serial number of the tender authorizing such transportation; a separate manifest shall be issued for each load carried by such truck or motor vehicle. The person obtaining such tender shall not transport or deliver or cause or permit to be transported or delivered any more nor any different commodity than is authorized by such tender. Each transporter authorized to transport oil or products on a manifest issued by a shipper shall not receive for transportation any different commodity than is described in such manifest and shall not receive oil or products in excess of the amount authorized by such manifest. The person authorized to transport oil or products by a manifest issued by a shipper, which manifest bears on its face the date and serial number of such tender, may rely upon the manifest delivered to him, and each consignee or person to whom oil or a product covered by such manifest is delivered by such transporter may rely upon such mani-

fest as authority for receiving the commodity delivered, provided such manifest appears to be valid on its face, is signed by the shipper, and bears the certificate of the shipper that the transportation of such oil or products is authorized by the tender the date and serial number of which is shown on such manifest.

(b) Whenever, pursuant to any order of the Commission, the transportation of oil or products by truck or motor vehicle is prohibited without a manifest showing the date and serial number of a tender authorizing such transportation, it shall be unlawful for any person to transport by truck or motor vehicle any oil or products without having or carrying in such truck or vehicle at all times between the point of origin and point of destination of such shipment a manifest bearing the date and serial number of the tender authorizing such transportation; and it shall be unlawful for any person to ship or transport or cause to be shipped or transported by truck or motor vehicle any oil or product without furnishing the operator of such truck or motor vehicle a manifest bearing the date and serial number of such tender, authorizing such shipment or transportation; provided, if the person to whom such tender is issued is the operator of such truck or motor vehicle and such tender identifies the truck or motor vehicle by license number and covers one load, such tender in lieu of a manifest may be carried in said truck or vehicle. Products shipped or transported in violation of this Section shall be deemed to be unlawful products. Oil shipped or transported in violation of this Section shall be deemed to be unlawful oil.

(c) It shall be the duty of every person who transports any oil or products by truck or motor vehicle, under conditions that require a tender or manifest as herein provided, to secure from each person to whom any part of such oil or products is delivered a receipt upon the reverse side of said tender or manifest, which receipt shall contain the number of gallons of oil and of each product delivered, the date of delivery and the signature and address of the purchaser or consignee of said oil or products. It shall be the duty of every person who transports any oil or products by truck or motor vehicle and makes deliveries thereof

to keep in this State for a period of two (2) years every such tender or manifest issued to him, together with the receipts and endorsements thereon. Such tenders or manifests shall at all times be subject to the inspection of the Commission, its agents and inspectors.

Arrests for Unlawful Transportation.

SEC. 3. In order to enforce the provisions of this Act every agent of the Commission, Highway patrolman, sheriff, constable and all peace officers of this State are empowered to stop any motor vehicle which may appear to be transporting oil or products, for the purpose of taking samples of the cargo and inspecting the shipping papers of such motor vehicle, provided such agent or officer shall have probable cause and reasonable grounds to believe that such vehicle is transporting any unlawful oil or unlawful products. If upon examination of such motor vehicle it is found that the same is transporting any unlawful oil or unlawful product, or is transporting any oil or product without authority of a tender required by order of the Commission, such authorized agent or officer shall, with or without warrant, arrest the driver thereof and carry him before the nearest Justice of the Peace and file a complaint under this Act against such driver. In any criminal action involving the provisions of this Act, no fee shall be allowed any such agent, patrolman, sheriff, constable or other officer for executing any warrant of arrest or *capias* or for making any arrest with or without a warrant.

Fines or Penalties.

SEC. 4. (a) Every person who transports by truck or motor vehicle, oil or products, who shall wilfully and knowingly fail to stop such truck or vehicle, when commanded to do so by any agent of the Commission or by any authorized officer or who shall wilfully fail to permit inspection by such agent or officer of the contents of or the shipping papers accompanying such truck or vehicle, shall be punished by a fine of not less than Fifty Dollars ($50) nor more than Two Hundred Dollars ($200).

(b) Every person who shall knowingly violate any provision of Section two (2) of this Act, or who shall knowingly ship or transport or cause to be shipped or transported by truck or motor vehicle over any public highway, in this State any unlawful oil or unlawful product, or who shall knowingly ship or transport or cause to be shipped or transported by truck or motor vehicle any oil or product without authority of a tender whenever a tender is required by any order of the Commission, or who shall knowingly receive from any truck or motor vehicle or knowingly deliver to any truck or motor vehicle any oil or product not covered by a tender authorizing the transportation thereof whenever a tender is required by any order of the Commission, shall be punished by a fine of not less than Fifty Dollars ($50) nor more than Two Hundred Dollars ($200).

(c) Whenever by order of the Commission a tender is required before oil or products may be transported or received for transportation by pipe line, railroad, boat or barge, and whenever pursuant to such order an authorized agent of the Commission approves or registers and issues to an initial transporter by pipe line, railroad, boat or barge a tender covering oil or products, such initial transporter may deliver to any connecting carrier or consignee the amount of oil or products covered by such tender, but shall not transport or deliver any more nor any different commodity than is authorized by such tender. Whenever such order provides that connecting carriers or consignees may rely upon the shipping papers executed by such initial transporter as authority to transport or receive the oil or products covered by such shipping papers provided such shipping papers show the date and serial number of the tender issued to the initial transporter, each such connecting carrier receiving oil or products from another transporter by pipe line, railroad, boat or barge, and each consignee receiving oil or products by pipe line, railroad, boat or barge under authority of shipping papers bearing the date and serial number of a tender issued to an initial transporter shall be deemed to be receiving such oil or

products by authority of a tender under the provisions of this Act.

(d) Every person who shall knowingly ship or transport or cause or permit to be shipped or transported by pipe line, railroad, boat or barge any unlawful product or unlawful oil, or who shall knowingly receive or deliver for transportation by pipe line, rail, boat or barge any unlawful product or unlawful oil, or who shall knowingly ship or transport or cause or permit to be shipped or transported by pipe line, rail, boat or barge oil or any product without authority of a tender whenever a tender is required by any order of the Commission, or who shall knowingly receive or deliver by pipe line, rail, boat or barge oil or any product without authority of a tender whenever a tender is required by any order of the Commission, shall be punished by a fine of not less than Fifty Dollars ($50) nor more than Two Hundred Dollars ($200).

Promulgation of Regulations Prior to Enforcement, Except as to Civil Actions.

SEC. 5. Whenever the Commission shall have adopted, after notice and hearing as provided under other statutes of the State, any rule, regulation or order pursuant to any statute of this State, no criminal action shall be maintained against any person involving the violation of any provision of such rule, regulation or order, until the Commission shall have promulgated such rule, regulation or order by publishing a complete copy of same in three (3) newspapers of general circulation in the State of Texas (such newspapers to be selected by said Commission) once each day for three (3) consecutive days, and on and after the seventh (7th) day after the date of the last publication such rule, regulation or order shall be effective and enforceable, in any criminal action, brought pursuant to this Act. No criminal action shall be maintained against any person involving the violation of any provisions of any amendment or modification of any order of the Commission until the Commission shall have promulgated such amendment or modification after its adoption by publish-

ing a complete copy of such amended or modified rule, regulation or order in three (3) newspapers of general circulation once each day for three (3) consecutive days, and, on and after the seventh (7th) calendar day of the last publication, such amendment or modification of such rule, regulation or order shall become effective and enforceable in any criminal action brought pursuant to this Act. However, the absence of promulgation by publication as herein provided shall not affect the enforcement of any order of the Commission in any civil or quasi civil action brought pursuant to this Act or to any statute of this State.

Certificate of Promulgation as Prima Facie Evidence.

SEC. 6. A certificate under the seal of the Commission executed by any member or the Secretary thereof, setting forth the terms of any order of the Commission and that it has been adopted, promulgated and published and was in effect at any date or during any period specified in such certificate shall be prima facie evidence of all such facts, and such certificate shall be admitted in evidence in any action, civil or criminal, involving such order and the publication thereof without further proof of such promulgation, adoption or publication and without further proof of its contents.

State Rangers Authorized to Serve Process.

SEC. 7. In all prosecutions, criminal actions, cases, proceedings or suits involving the enforcement of the provisions of this Act or of any order of the Commission all State Rangers and all agents of the Commission shall have the power and authority to serve any criminal or judicial process, warrant, subpœna or writ just the same and as fully as any sheriff, constable or peace officer is authorized under existing laws when so directed by the court issuing such process. Such rangers and such agents of the Commission may serve such process, warrant and subpœna anywhere within the State of Texas although it may be directed to any sheriff or constable of a particular county. They shall make the same return as any other officer, sign their name and add

thereunder the title of (in the case of a State Ranger) "State Ranger," and (in the case of an agent of the Commission) the words "Agent, Railroad Commission of Texas," which shall be sufficient to make it valid if the writ is otherwise properly made out. No fees of any kind for such services shall be allowed such State Rangers or agents of the Railroad Commission other than their regular salary or compensation.

Pleading, Proof and Venue.

SEC. 8. (a) In any complaint, information or indictment alleging a violation of an order of the Commission, it shall not be necessary to set forth fully the terms of such order, and it shall be sufficient therein to allege the substance of the order, or the pertinent term or terms thereof alleged to have been violated.

(b) In any criminal action filed pursuant to this Act, a certificate executed by any member of the Commission or by the Secretary thereof, showing the amount of allowable oil which may be produced per day or during a stated period from any oil well or wells, proof of any production from which is involved in such criminal action, shall be admissible in evidence and shall be prima facie evidence of the facts therein stated.

(c) The venue of a criminal action maintained pursuant to this Act is hereby fixed in the county where the oil or products involved in such criminal action is received or delivered, or in any county in or through which such oil or product is transported.

(d) Nothing herein shall restrict or limit the power of the Commission to adopt rules, regulations or orders pursuant to the oil and gas conservation statutes of this State including all provisions of Title 102 of the Revised Civil Statutes of Texas of 1925 and all amendments thereto.

Review of Rejection of Tender.

SEC. 9. Whenever an application for a tender is rejected by an authorized agent of the Commission, it shall be the

duty of such agent to return one copy of such application to the applicant endorsing thereon all the reasons for such rejection. Such applicant whose tender may be rejected shall have the right to appeal from any action of such agent by filing a petition in the District Court of Travis County, Texas, against the Commission, for a review of the ruling of such agent. The Court hearing such petition shall have the power to sustain, modify or overrule any action of such agent relative to a tender application and to issue such restraining orders or injunctions as the facts may warrant. It shall be the duty of the Clerk of the Court wherein such petition is filed to issue to the Commission a notice setting forth briefly the cause of action stated in such petition. But the Court shall not enter any order on any such petition until after a hearing thereon to be heard not less than five (5) days from the issuance of such notice. Any person whose application for tender is not acted on within twenty (20) days from the date of its filing shall have the right of appeal in the same manner above provided for appealing from a rejection of a tender application. Any person dissatisfied with the decision of the District Court may appeal to the Court of Civil Appeals.

Forfeiture of Unlawful Products; Attorney General Duties.

SEC. 10. (a) All unlawful oil and unlawful products, regardless of the date of production or manufacture thereof, are hereby declared to be a nuisance and shall be forfeited to the State as hereinafter provided. It shall be the duty of the Commission, its servants, agents, and employees, highway patrolmen, sheriffs, constables, and peace officers, upon the discovery of any unlawful oil or unlawful products, to file immediately with the Attorney General of Texas, a report giving a description of such unlawful oil and/or unlawful products, including the ownership, party in possession, the amount, the location and classification thereof.

(b) When the Attorney General is advised from any source of the presence and existence of unlawful oil and/or

unlawful products it shall be his duty to institute a suit *in rem* against such unlawful oil and/or unlawful product and against all persons owning, claiming, or in possession thereof, such suit to be brought in the name of the State of Texas in any court of competent jurisdiction in Travis County or in the county in which such oil or product is located. If it shall appear to the court from an examination of the petition or after hearing evidence thereon at a preliminary hearing that unlawful oil and/or unlawful products mentioned in the petition are in danger of being removed, wasted, lost, or destroyed, the court is authorized and required, in term time or in vacation, to issue restraining orders or injunctive relief, either mandatory or prohibitive, or to appoint a receiver to take charge of the oil or product in question, or to direct the sheriff of the county in which the unlawful oil or unlawful products are located to seize and impound the same until further orders of the court.

(c) Notice of pendency of such suit shall be served in the manner prescribed by law; either party to said suit may demand a trial by jury on any issue of fact raised by the pleadings and the case shall proceed to trial as other civil cases. If, upon the trial of such suit the oil or product in controversy is found to be unlawful oil or unlawful products, then the court trying said cause shall render judgment forfeiting the same to the State of Texas and authorizing the issuance of an order of sale directed to the sheriff or any constable of the county where the oil or products are located commanding such officer to seize and sell said property in the same manner as personal property is sold under execution. The court may order the oil or products sold in whole or in part as may be deemed proper and the sale shall be conducted at the court house door of the county where the oil and/or products are located and shall conform in all respects to the sale of personal property as aforesaid. The money realized from the sale of any such unlawful oil and/or products shall be applied, first, to the payment of the costs of suit and expenses incident to the sale of such oil and/or products after such expenses have been approved and allowed by the court try-

ing the case, and all funds then remaining, shall be remitted forthwith to the State Treasurer and shall be by the Treasurer placed to the credit of the General Revenue Fund of the State of Texas.

(d) The officers of said Court shall receive the same fees provided by law for other civil actions. Provided further that the Sheriff executing said sale shall issue a bill of sale or certificate to the purchaser of said oil and/or products and the Commission shall, upon the presentation of said certificate of clearance, issue a tender, if a tender is required, permitting the purchaser of said oil and/or products to move the same into commerce.

Provisions Cumulative.

SEC. 11. The provisions of this Act shall be cumulative of all other provisions of the Civil Statutes, the Penal Code and the Code of Criminal Procedure, and the remedies herein provided shall be cumulative of all other remedies provided in the Civil Statutes, the Penal Code and the Code of Criminal Procedure.

Partial Invalidity.

SEC. 12. It is hereby declared to be the legislative intent to enact each separate provision of this Act independent of all other provisions, and the fact that any section, word, clause, sentence or part of this Act shall be declared unconstitutional shall in no event affect any other section, word, clause, sentence or part thereof.

Exception as to Retail Purchases.

SEC. 13. The provisions of this Act shall not apply to the retail purchase of the products of petroleum where such products so purchased at retail are contained in the ordinary equipment of a motor vehicle and are used only for the operation of such motor vehicle in which contained. (Acts 1935, 44th Leg., p. 624, ch. 246.)

Effective May 12, 1935.